IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-6431

ABDIEL CABAN,

Appellant,

v.

KAZIM MOHAMMED and MARIA MOHAMMED,

Appellees.

APPELLANT'S BRIEF

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INTRODUCTION

This is an appeal from a judgment of the New York State Court of Appeals, as well as two subsequent judgments and orders of that court denying reargument. They dismissed appellant's appeal to that court from lower court orders dismissing appellant's objections to the adoption of his two children and approving their adoption by appellees, upon a holding that the constitutional issue was insubstantial. Appellant con-

tends that New York State Domestic Relations Law, §111, as it stood, and was construed and applied by the courts of New York, is unconstitutional in authorizing the adoption of appellant's children, who he was raising, without his consent.

The appeal was docketed on March 27, 1978, and probable jurisdiction noted May 15, 1978.

(a) The Opinions Below

The opinion of the Court of Appeals of the State of New York reported as *Matter of David A.C.*, 43 N.Y.2d 708, 401 N.Y.S.2d 208 (1977). (Appendix 45) That court dismissed the appeal from the order of the Appellate Division of the Supreme Court of the State of New York, Second Department. The same was reported as *Matter of David Andrew C.*, 56 A.D.2d 627, 391 N.Y.S.2d 846. (Appendix 41) The Appellate Division had affirmed orders of the Surrogate's Court, Kings County, which dismissed appellant's objections and approved the adoptions. The opinion of the Surrogate's Court was not reported. A copy is found at Appendix 27.

(b) Jurisdiction

These are two contested adoption proceedings. They were severally instituted by petition pursuant to Article 7 of the New York Domestic Relations Law, as it stood at the time, in the Surrogate's Court, Kings County. Each was to adopt a child of appellant. They were

decided by the court of first instance after a joint trial, in a single opinion but with separate orders dismissing appellant's objections and granting the adoptions despite appellant's constitutional objections. They were processed together on appeal. The court of first instance was upheld by the appellate courts of the State of New York. The issue culminated in a final judgment rendered by the highest court of New York State, where was drawn in question the validity of a statute of New York State on the ground of its being repugnant to the Constitution of the United States. The decision was in favor of its validity.

Jurisdiction of this appeal is conferred by 28 U.S.C. §1257(2) on the ground that a New York State statute, Domestic Relations Law, §111, as it stood, was construed and applied, is repugnant to the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States, but that its validity was necessarily sustained by the New York State courts in rendering the judgments on appeal.

The judgment of the Court of Appeals of the State of New York, sought to be reviewed, was entered November 17, 1977, in a memorandum. Two motions for reargument and rehearing were successively denied by orders filed January 10, 1978 and February 14, 1978, in the Court of Appeals. The notice of appeal was filed on March 10, 1978 in the Surrogate's Court, Kings County, and on March 13, and March 22, 1978, in the office of the Clerk of the Court of Appeals of the State of New York, the clerks of such courts together being possessed of the entire record.

Appellant entered his appearance and docketed his Jurisdictional Statement on March 27, 1978. The appeal was thus timely taken and docketed within 28 USC 2101 and Rule 13 of the The Rules of this Court.

Probable jurisdiction was noted by this Court, and leave to appeal *In Forma Pauperis* was granted on May 15, 1978.

(c) 1. Constitutional Provision Involved.

AMENDMENT XIV.

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Statute Involved

New York Domestic Relations Law, §111, (14 McKinney's Consolidated Laws of New York, Annotated, copyright 1964, Cumulative Annual Pocket Part for use in 1976-1977, p. 51-52; McKinney's 1975 Session Laws of New York, Ch. 704, §3, p. 1117), (especially §111, subds. 2 and 3).

"§111. Whose consent required [Effective until Jan. 1, 1977]

Subject to the limitations hereinafter set forth consent to adoption shall be required as follows:

1. Of the adoptive child, if over fourteen years of age, unless the judge or surrogate in his discretion dispenses with such consent;

2. Of the parents or surviving parent, whether adult or infant, of a child born in wedlock;

3. Of the mother, whether adult or infant, of a child born out of wedlock;

4. Of any person or authorized agency having lawful custody of the adoptive child.

The consent shall not be required of a parent who has abandoned the child or who has surrendered the child to an authorized agency for the purpose of adoption under the provisions of the social services law or of a parent for whose child a guardian has been appointed under the provisions of section three hundred eighty-four of the social services law or who has been deprived of civil rights or who is insane or who has been judicially declared incompetent or who is mentally retarded as defined by the mental hygiene law or who has been adjudged to be an habitual drunkard or who has been judicially deprived of the custody of the child on account of cruelty or neglect, or pursuant to a judicial finding that the child is a permanently neglected child as defined in section six hundred eleven of the family court act of the state of New York; except that notice, of the proposed adoption shall be given in such manner as the judge or surrogate may direct and an opportunity to be heard thereon may be afforded to a parent who has been deprived of civil rights and to a parent if the judge or surrogate so orders. Notwithstanding

any other provision of law, neither the notice of a proposed adoption nor any process in such proceeding shall be required to contain the name of the person or persons seeking to adopt the child. For the purposes of this section, evidence of insubstantial and infrequent contacts by a parent with his or her child shall not, of itself, be sufficient as a matter of law to preclude a finding that such parent has abandoned such child.

Where the adoptive child is over the age of eighteen years the consents specified in subdivisions two and three of this section shall not be required, and the judge or surrogate in his discretion may direct that the consent specified in subdivision four of this section shall not be required if in his opinion the moral and temporal interests of the adoptive child will be promoted by the adoption and such consent cannot for any reason be obtained.

An adoptive child who has once been lawfully adopted may be readopted directly from such child's adoptive parents in the same manner as from its natural parents. In such case the consent of such natural parents shall not be required by the judge or surrogate in his discretion may require that notice be given to the natural parents in such manner as he may prescribe."

(d) The Questions Presented for Review.

Do the provisions of New York Domestic Relations Law, §111(2,3), McKinney's 1975 Session Laws of New York, Ch. 704, §3, on their face and as applied, violate appellant's rights of Due Process and the Equal Protection of the laws granted by the Fourteenth

Amendment to the United States Constitution in authorizing the adoption of his children without his consent by a stranger and the termination of his parental rights without proof and a particularized finding that appellant was an unfit parent or had abandoned his children, upon the sole basis that the children were born out of wedlock and that appellant is the male parent, despite his strong family ties to his children; in denying the right of appellant to prevent the adoption of his children because of his sex and because they were born out of wedlock while granting such a right to mothers whether or not their children were born in wedlock and to fathers if their children were born in wedlock; and authorizing the mother of his children born out of wedlock to veto appellant's petition to adopt them but denying him the equal right to veto her petition, upon a classification based upon sex?

(e) Statement of the Case.

(1)

Summary

The single hearing for both contested adoption proceedings covered several days of testimony. When it concluded, a strong family relationship between appellant and his children had been proved despite lack of a marriage certificate between their parents. Appellant's love and affection for them and his supportive role as father was not shown to have been diminished by

absence of such a certificate. His abandonment of the children had been claimed in the adoption petitions but not proved. Unfitness on his part was neither alleged nor proved.

The proceedings culminated in the adoption orders. They terminated his parental relationship without his consent and supplanted him as father by a non-parent. The New York courts rested by upholding the constitutionality of a statute (Domestic Relations Law, §111, (2,3) making appellant's consent to adoption of his children unnecessary since

(1) the children were born out of wedlock. (This factor would have been insignificant if appellant had been female (§111, (3));

(2) Appellant was the male, not the female parent. (This factor would have been insignificant if the children had been born in wedlock (§111, (2)).

Neither statutory provision took into account the rights of a fit unwed father who cared for his children over the years to keep them.

Likewise, because of their respective genders, the mother was permitted to adopt her children and secure a higher jural relationship to them without the father's consent, but the father was denied the right to adopt his own children for lack of her consent.

(2)

The Pre–Birth Relationship of the Children's Parents and the Family which Resulted.

On direct examination, the mother, appellee Maria Mohammed, testified that she and appellant, Abdiel

Caban, established an out-of-wedlock family relationship with each other in 1968. (R. 72, 74) At the time, she was eighteen years old and he was thirty-one. (R. 73)

It was no abrupt fly-by-night relationship. Maria had known Abdiel all her life and their families were close. They commenced living together in Manhattan in September of 1968 (R. 73, 117), and then moved together to a new apartment in Brooklyn. (R. 73) Sex relations between the couple had already begun some two months earlier. (R. 118) She adopted his surname and became known as Maria Caban, holding herself out as his wife. (R. 125-128) Together, and with their two children, David Andrew and Denise, who were born of and into their relationship, they constituted a *de facto* family for some five years, until 1973, when she left. (R. 179) The unit was referred to as a family by the trial judge. (A. 28)

(3)

Birth of Children Into De Facto Family – Paternity Acknowledged – Family Relations.

The child, David Andrew Caban, was born into the family on July 16, 1969. Abdiel Caban is duly noted on the birth certificate as the father. (R. 74, 86) On March 12, 1971, the second child of the couple, Denise Caban, was born. (R. 78) Her birth certificate also records Abdiel as the father. In addition, at Maria's request, he formally acknowledged his paternity of Denise to the Board of Health. (R. 85-6)

From the outset, appellant always acknowledged to the world that he was the father of both children, to whom he had given his name. (R. 221, 336) He reaffirmed this at trial. (R. 336-7) His relationship with them has always been one of warmth and understanding, and he has always loved and cared for them. (R. 337) Maria's mother, who testified for appellees, conceded that this was true. (R. 222) The trial court found that Denise was too young to articulate but that David expressed love for his father. (A. 29)

At the trial, Maria complained that Abdiel was not a good provider. (R. 76-7, passim) Appellant countered that he provided for and contributed to the support of the children during the entire period they lived with him. (R. 337-340) The trial court accepted his testimony. (A. 28)

> "During this entire relationship both the natural mother and the putative father were employed and contributed to the support of the family."

Appellant did so while at the same time he helped to support two earlier children of a prior marriage. (A. 29; R. 390) He did not send Maria money for the children's support during the periods Maria kept them from him because she demanded that he terminate all contact with her. (R. 414-5)

At a loss for proof of appellant's unfitness, and admitting that he was never "cruel" to the children, (R. 180) Maria alleged only the familiar type of harsh conduct toward herself often claimed in matrimonial disputes and added a claim that appellant had borrowed some money from her which he still owed. (R. 189-190, 193)

(4)

Removal of the Children from Their Father's Home – Reestablishment of Contact – Appellees' Sending the Children to Puerto Rico.

After five years of family life together, when David was four and Denise two, Maria took the children from appellant and moved in with appellee, Kazim Mohammed in December, 1973. (R. 90) The appellees were married a month later. (R. 94)

As the father describes the incident of her departure with the children, he had returned home from work one evening in March 1974, to find the apartment empty. It was dark and the usual noises of children playing were missing. When he called out, there was no response. He searched the apartment for his family in vain. Upstairs, at the apartment of Maria's mother, he was told that their whereabouts was not known. He returned to his own apartment to find a note from Maria that she had taken the children and left. (R. 343)

Contact with the children was soon reestablished. Appellant made certain to see his children each weekend for some six months. (A. 28; R. 98, 345-350) They would sleep over in appellant's apartment and he would cook for them, play with them, take them to the park, celebrate holidays with them and enjoy a close fatherly relationship with his children. (R. 347-350)

The customary weekend visits came to an abrupt end. The children were sent off by their mother and stepfather, the appellees, to live with their maternal grandmother in Puerto Rico in September, 1974. (R. 165, 352) There they remained away from their parents for fourteen months. (R. 183)

(5)

Relations of Children with Paternal Side of Family – The Father Brought the Children Back with Him From Their Grandmother in Puerto Rico and Reassumed Their Custody and Care.

Appellant's children were full members of their father's family. Their paternal grandfather, Emilio Caban, came from Puerto Rico to testify. He fully considered the children as his grandchildren, as indeed they are. (R. 237)

The warm, natural, familial ties which the children enjoyed with their father's family emerge from the undisputed testimony. They add yet another dimension to the basic relationship with their father. (R. 237-250, 368-371)

While the children were in Puerto Rico, their paternal grandfather often visited them. He kept Abdiel advised on how they were doing. (R. 244) Up until the time Abdiel later assumed custody, he kept in touch with his children through his parents every few weeks. They kept him informed. (R. 358)

In November, 1975, Abdiel went to Puerto Rico to see his children. He had arranged for them to be at his parent's house, and spent the week with them there. Abdiel noticed that the children did not look well. They had acquired new habits of yelling and of disobedience. Problems that had not existed when the children were living with him had developed. They were described. (R. 360-367) Abdiel did not like the way they were being raised. He decided that it would be in his children's best interests to bring them back with him to New York, and he did. (R. 360-368) But not

without notifying Maria's parents where he could be reached. (R. 267-8)

At the time, there had been no court order respecting custody of appellant's children. There never was one awarding custody to the maternal grandmother. The curious statement in the Surrogate's opinion characterizing appellant's exercise of his parental responsibilities (A. 29-30):

> ("He justified his conduct in removing the children from their lawful custody by his concern for their welfare. His testimony is belied by the appearance and credible testimony of the maternal grandmother from whose temporary custody the children were snatched")

assumes that the conduct of Abdiel Caban in taking his own children under his own wing from a non-parent was somehow illegal. It was hardly that. There was no evidence that the maternal grandmother had custody rights of appellant's children equal to or greater than did appellant himself.

Upon Abdiel's return with his children to Brooklyn from Puerto Rico, he began the search for other quarters to accommodate his enlarged family.[1] He found a home and contracted to purchase it. (R. 371-4)

While the children were living in Brooklyn with their father, a neighbor, Mrs. Quanne, had the opportunity to observe the family closely. Mrs. Quanne testified that when she first saw them on their return from Puerto Rico, Denise was sick-looking, "coughing, croupie and

[1] Abdiel had obtained a divorce from his wife of a previous marriage that had long since been dead for many years. (R.353-4) He married his present wife, Nina, in December of 1975. (R.356-7)

very, very thin." (R. 227, 229) She saw the children every day and within two or three weeks they looked much better and were putting on weight. (R. 230) The neighbor described the relationship between Abdiel, his wife, Nina, and the two children as beautiful and lovely. The children were obviously happy and responded to his love with equal affection for their father. (R. 231-2)

They remained in their father's custody for two months, until January 15th, 1976. Appellant exercised full parental responsibility for them. He supported and cared for his children, provided for their health and medical needs, and furnished them with a warm, affectionate and secure home. (R. 227-232) At the same time, through his attorneys, he sought to work out custody arrangements with appellee, Maria Mohammed. (A. 29) In vain.

(6)

Custody Litigation in Family Court – Later Commencement of Adoption Proceedings in Surrogate's Court – Cross-Petitions – Last Days of Parenthood.

While appellant was thus taking care of his children in his own home, custody litigation between the parents began in Family Court. On January 15th, 1976, that court issued a temporary order placing the children with the mother and awarding visitation rights to the father pending a trial on the merits. The same was adjourned to await the outcome of the later-commenced adoption proceedings in the Surrogate's Court. No hearing on custody was ever held. (A. 29; R. 270-1,

374-9) Legal custody as between the contesting natural parents was never decided.

It was only after the Family Court custody proceedings had commenced and while they pended that appellees, both stepfather and the mother, petitioned for adoption in Surrogate's Court. (A. 3, 5, 8, 10, 22, 25, 29) Appellant objected. He and his wife, Mrs. Nina Caban, the children's stepmother, cross-petitioned. (A. 11, 16) From then until the adoption orders effected the abolition of his parental rights, appellant regularly saw the children at his home on a weekly basis. (R. 378-80) They were completely at home with their father and stepmother and engaged in normal family activities and pursuits. The family would go to a show, to a park, or just stay home and relax. They would all have dinner together, and in that manner the children would enjoy their stay with their father and their presently enlarged family which by now included also their stepmother and her own two children. (R. 379) Appellant saw to all of their physical needs, including medical attention, when they were with him. (R. 379, 431)

(7)

Appellant's Family Ties with His Children Dismembered and a Father Replaced as Parent by a Stepfather.

With the adoption orders of September 10th, 1976, all legal connection between father and children were abrogated. A blank wall was judicially erected to permanently and totally separate the children from their father.

Until the moment of their adoption by their stepfather, the children had lived more than half their lives in their father's home. As for the rest, they had been in steady weekly contact with him, except for the fourteen month separation which began when appellees sent them away to Puerto Rico and ended when appellant brought them home.

In order to allege some basis for ousting appellant of his parental rights and dismembering his family by adopting his children, appellees formally limited their claim to a charge that appellant had "abandoned" the children. (A. 4, 6, 7, 8) But they rested their case without proving it. Nor did they disprove appellant's fitness as a parent or challenge his lengthy and closely woven paternal relationship to his offspring. In the end, the court made no specific finding of unfitness, neglect or abandonment of the children by appellant.

The adoptive father, appellee Kazim Mohammed, professed to love appellant's children. But he had acquiesced in their separation from himself and from his wife for over a year until appellant went to Puerto Rico and brought them back. (R. 101, 104) Kazim's own relationship with the children had indeed been insignificant compared to that of the natural father. The Surrogate referred to Kazim's relationship to the children as a "new family". (A. 28) It was not until appellant brought his children back and furnished them with a home as a natural parent that the stepfather was bestirred to join with his wife and petition for their adoption.

The hearing officer, Law Assistant Renee R. Roth, professed ignorance of the substantive Due Process purpose of the hearing. (R. 253)

(cf. *Stanley v. Illinois*, 405 US 645, 658:

"All * * * parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody.")

Involved here was the threatened permanent removal of appellant's children from his custody, or any possibility thereof. Ms. Roth resolved her doubts by concluding that: "The purpose of this hearing is to afford the putative father with a hearing." (R. 256-7)

The Surrogate was not similarly obsessed with doubts as to the purpose of the hearing:

"* * * a putative father's consent to such an adoption is not a legal necessity" (A. 27)

"The prime objective of allowing a putative father to be heard is therefore not to determine the degree of his continued interest in the child but rather to determine the best interests of the child. Any evidence the putative father may offer concerning the solidity of the marriage and the concern and treatment of the child in the new family is particularly relevant." (A. 28)

With one stroke, the court denigrated the natural father to the level of a semi-official law guardian, or an *amicus curiae*, without any substantial parental rights of his own to protect. Instead of treating the hearing as an inquiry into the father's fitness, as mandated by *Stanley*, the trial court ruled the issue to be the fitness of the would-be adoptive parents. Concluding that petitioning stepfather and mother were fit, the trial court, with all the proof of appellant's love and devotion to his children before it, and without a scintilla of evidence of his unfitness, neglect or abandonment, ignored his parental rights and granted the petitions to adopt.

The adoption orders resulted in Kazim Mohammed replacing appellant as legal father. They stripped appellant of the children he had sired, loved, raised and cared for. In turn, the children have forever been separated from their concerned and devoted father. David Andrew was then seven years old. Denise was five. Four and a half years of David's life and more than half of Denise's had been spent in their father's home and care. But now, by aegis of the state courts and §111 (2,3), a surrogate father has been installed in the natural parent's place, and only (a) because the surrogate father was found to be fit; (b) because appellant is a male, not a female, parent, he cannot by statute keep his children against a stranger's adoption petition (though he can and did contest the mother for their custody); (c) as an unwed father, he was by statute automatically disqualified from asserting a right to continue to care for his children against a stranger's adoption petition, though he had always conducted himself as would a devoted married father; (d) as an unwed male parent, the New York statute made it unnecessary to establish his unfitness or abandonment on his part to divest him of his children without his consent and replace him as father with a stranger; (e) and the highest court of New York, on appeal to it on the ground that the statute could not constitutionally have such consequences; held that it could and it did.

(8)

The Mother was Allowed to Adopt Without the Father's Consent but the Father Was Not Allowed to Adopt Without the Mother's Consent.

Appellant and his wife, Nina, had cross-petitioned for adoption. If Kazim was the "stepfather" (so-called by the Surrogate), Nina was the stepmother.

Appellant's refusal to consent to Kazim's adoption was irrelevant under the statute, simply because appellant was the unwed father. Appellee Maria Mohammed's refusal to consent to Nina's adoption was sufficient to bar it because she was the unwed mother.

At the same time, the natural father's cross-petition to adopt his own children was dismissed out-of-hand because the female parent had not consented and the statute made that necessary. (A. 27) On the other hand, the natural mother's petition to adopt (and gain a superior jural status as parent) was granted despite the non-consent of the male parent, because the statute made the consent of the male parent unnecessary. (A. 30)

(f) Summary of Argument

Appellant's family relationship to his children is such as is protected by the Fourteenth Amendment against enforcement of a New York State adoption statute (N.Y. Dom.Rel.L. §111 which authorizes taking his children from him and installing a stranger in his place as father without his consent.

The statute, which is construed and applied by the New York Court of Appeals permanently to deprive appellant, a fit and concerned natural parent, of the children he has (i) participated in raising since birth; (ii) for whom he has shouldered the full responsibilities of parenthood in their support, daily supervision and care; (iii) of whom he has enjoyed and shared, and at times exclusively exercised, actual custody as their father by an adopting stranger without his consent, violates appellant's fundamental substantive Due Process rights of parenthood.

Since appellant is a fit parent, New York's interest in caring for his children is *de minimus*, and the State lacks power permanently to take them from him by installing a stranger in his place as their father without his consent.

A statutory scheme which requires the consent of an unwed mother to the adoption of her child by a stranger, absent certain legislatively defined exceptions – not including parental unfitness – but makes the consent of the unwed father to such an adoption unnecessary under any circumstances, without regard to how fit and involved that unwed father may be with his children, is not closely tailored to effectuate an important state interest, impairs his fundamental constitutional and statutory rights upon the basis of an irrational classification grounded on sex, rather than parental fitness and the proven relationship of the father to his children, and violates the appellant's right to Equal Protection of the Laws in the continued enjoyment of his parental relationship with his children.

The New York statute, which requires the consent of a wed father to the adoption of his children, absent

certain legislatively defined exceptions – not including parental unfitness – but makes the consent of an unwed father unnecessary under any circumstances, without regard to how fit and involved that unwed father may be with his children, is not closely tailored to effectuate an important state interest, rests upon an irrational classification concerning the legal relationship of the parents to each other rather than parental fitness and the proven relationship of the father to his children, and violates the appellant's right to Equal Protection of the Laws in the continued enjoyment of his parental relationship with his children.

The New York statute, which authorizes a mother of children born out of wedlock to adopt them without the natural father's consent, but which requires the father to obtain the mother's consent as a condition to his adopting his own children, though he be a fit and concerned father with long and deep involvement as a parent in their care, is not closely tailored to effectuate an important state interest, discriminates against appellant because of his gender and violates his right to the Equal Protection of the Laws.

(g) Argument

POINT I.

APPELLANT HAS A RELATIONSHIP TO HIS CHILDREN WHICH IS ENTITLED TO SUBSTANTIVE DUE PROCESS SAFEGUARDS AND TO THE EQUAL PROTECTION OF THE LAWS.

That appellant has a constitutionally protected interest will be here discussed first. The nature and extent of that protection will then follow.

By *Quilloin v. Walcott*, ____ US ____, 98 S.Ct. 549, 54 L.Ed.2d 511, the Court laid to rest fears of applying the principles of *Stanley v. Illinois*, 405 US 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972) to all unwed fathers on a purely biological basis, with the consequent granting of veto power over adoption to fathers lacking any substantial relationship to and interest in their children. The present appeal presents the parental rights of a father who has a full history of devoted paternal relationship and interest in his children, including daily parental responsibility for their welfare, to keep them against state action that would deprive him of them, though he is not shown to be unfit, solely because of his gender and his unwed status, and break up his family. Because of the soaring rates of illegitimate births, the problem affects large segments of the population.

Appellant's life with his children and his paternal ties to them has been described at some length under "*(e) Statement of the Case*", above. Suffice it to say, the necessity for an unwed father to be possessed of

substantial interest in his relationship with his children, such as is outlined in the "*Statement of the Case*", beyond mere biological parenthood, to entitle him to constitutional protections in opposing adoption, which was just elucidated by this Court in *Quilloin v. Walcott*, has been met. Quilloin had attacked the constitutionality of a Georgia statute which provided, as the New York statute has now been construed, that only the mother's consent was required for the adoption of a child born out of wedlock. He relied on the rights of parents, including unwed fathers, expressed in *Stanley v. Illinois*, 405 US 645. The Georgia Supreme Court (238 Ga. 230), had upheld the statute, resting exclusively on *Matter of Malpica-Orsini*, 36 N.Y.2d 568. *Stanley* was not disregarded. But the fact that in *Stanley*, "the father was a de facto member of the family unit", but not in *Quilloin*, was held enough by that court to distinguish it. (238 Ga., 233-4)

This Court affirmed in a unanimous opinion by Mr. Justice Marshall. Neither *Malpica-Orsini*, nor this Court's dismissal of the appeal therein (*Orsini v. Blasi*, 423 US 1042), was mentioned. The holding rested on the unsubstantial relationship between the Georgia father and his child, which had left the paternal shoes empty in a real sense and ready to be filled by the stepfather.

These factors were ruled by the Court to be dispositive. In substance, the Court held that an unwed father had to be a father in more than name only. With this as the crucial factor, whether a statute is constitutionally applied would depend on the facts at bar in each case. The Court reaffirmed *Stanley v. Illinois* but approached the problem of its application by noting that

"Stanley left unresolved the degree of protection a State must afford to the rights of an unwed father, in a situation such as that presented here, in which the countervailing interests are more substantial." (54 L.Ed.2d, 515)

The facts at bar are quite different. Simply to compare them with those lacking in *Quilloin* is to demonstrate that they fill the vital gap necessary to invoke *Stanley* in protecting the rights of unwed fathers in adoption cases. Appellant was shown to have had substantially the same fatherly relationship to his children as he would be expected to have had if they had been born in wedlock. *Quilloin* holds that this is key to the existence of a substantial constitutionally protected interest in that relationship.

The effect of the adoption orders on appeal was to terminate appellant's parental rights. (See *Matter of Anonymous (St. Christopher's Home),* 40 N.Y.2d 96, 97-8, 386 N.Y.S.2d 59 (1976)). Nevertheless, though a solid family relationship existed between father and children, the New York courts construed Domestic Relations Law, §111 as authorizing their adoption by a stepfather, without appellant's consent, and thus putting an end to it. They overruled his objection that the statute could not allow such a result consistent with the Fourteenth Amendment absent proof or findings of unfitness by holding that it constitutionally did so. They cited *Matter of Malpica-Orsini,* a case which despite the sweep of its opinion was limited to upholding the constitutionality of the statute. They thereby rested their holding upon a similar finding of constitutionality of the statute. *Matter of Malpica-Orsini* was a case resting on a bare bones conclusory

stipulation in lieu of testimony, in which there was a total absence of proof of a meaningful relationship between father and child such as appellant and his children enjoy here. This was of course vital to the issue as stated in *Quilloin.*

The present case is quite different. It is "[t]he private interest here, that of a man in the children he has sired and raised" which appellant has demonstrated exists after an extensive hearing that "undeniably warrants deference and, absent a powerful countervailing interest, protection." *Stanley v. Illinois,* 405 US, 651.

Quilloin holds that the facts demonstrating the existence of such an interest must first be shown. They were.

POINT II.

THE NEW YORK COURTS, ACTING PURSUANT TO N.Y. DOM. REL. L. §111 (2,3) IGNORED APPELLANT'S CONSTITUTIONALLY PROTECTED RELATIONSHIP WITH HIS CHILDREN AND DENIED HIM SUBSTANTIVE DUE PROCESS OF LAW.

The courts below approved adoption of appellant's children by a stranger. This effectively stripped appellant of his parental rights. *Matter of Anonymous (St. Christopher's Home),* 40 N.Y.2d 96, 97-8 (1976). Paying only ritual respect to *Stanley v. Illinois,* 405 US 645, while ignoring its mandate, the courts below gave with the one hand ("an opportunity to be heard") while they took away with the other the rights of

appellant guaranteed by the Fourteenth Amendment to maintain his parental ties with his own children absent a threshold finding, based on proof, of his own unfitness. *Stanley v. Illinois*, supra; *Matter of Bennett v. Jeffreys*, 40 N.Y.2d 543. There was no such proof. There was no such finding. The evidence was quite to the contrary. This is manifest both from the transcript and from the total absence of any finding or adjudication of unfitness or like factor in the opinions below.

The Surrogate's Court did not treat the hearing as one into the fitness of the natural father, which *Stanley* said was necessary, but which the courts below disregarded, but as limited to the fitness of the petitioning stepfather. It decided the case on that basis. The natural father was "treated not as a parent but as a stranger to his children", which *Stanley* held violates constitutional rights (405 US, 648). The Appellate Division affirmed on the ground that the result was justified by N.Y. Dom. Rel. L., §111, which it held to be constitutional. The Court of Appeals agreed.

The natural father was regarded below much as an unofficial law guardian, an *amicus curiae*, an evidence gatherer on the stepfather, with only an adjective right to be heard on the question of his replacement's fitness, but no substantive parental rights of his own to protect. To justify this, the New York courts, in effect, amended *Stanley v. Illinois* by removing the words "on their fitness"[2] from the language of the United States

[2] See Comment, Getman, "The Unwed Father's Rights in Adoption Proceedings", 40 Albany Law Review 543 (1976): "The Supreme Court held [in *Stanley v. Illinois*], it would seem, that the parental rights of an unwed father could not be *(continued)*

Supreme Court, when it held:

> "[All parents] are constitutionally entitled to a hearing on their fitness before their children are removed from their custody." (405 US, 658)

The case was decided as though the children's natural father "had no [substantive] rights which [the court] was bound to respect." (cf. *Dred Scott v. Sanford*, 19 Howard 393). The approach is at odds with current concepts. It is completely out of date. It is contrary to present perceptions of justice and to the law as this Court has shown it to be today.

Decisions of this Court with respect to rights of parents under the Fourteenth Amendment should be accepted as binding in New York as in any other State. This elementary proposition was accepted by the New York Court of Appeals in *Matter of Bennett v. Jeffreys*, 40 N.Y.2d 543, 545-6. *Stanley v. Illinois* was there recognized as the font of the "existing constitutional principles" which limit the exercise by the State of *parens patriae* power "to supplant parents except for grievous cause or necessity." Said New York's high court in *Bennett v. Jeffreys*, (40 N.Y.2d, 548):

> "Indeed, as said earlier, the courts and the law would, under existing constitutional principles, be

(footnote continued from preceding page)

terminated without proof that the father was unfit. The State interest in the welfare of children was not served by terminating the parental rights of a fit parent, whether that parent be married or unmarried. The Court therefore set a minimum substantive due process standard for the termination of parental rights – parental unfitness. It is from this substantive due process basis that the Court turned to the procedural aspects of the case." [p. 550] "Procedural due process requires that an unwed father be given a hearing, and according to the Stanley opinion, substantive due process requires the hearing to be on his fitness." [561-2]

> powerless to supplant parents except for grievous cause or necessity (see *Stanley v. Illinois*, 405 US 645, 651, *supra*, in which the principle is plainly stated and stressed as more significant than other essential constitutional rights)."

In ringing terms, the Court of Appeals left no doubt where the law lies in the wake of *Stanley*: (40 N.Y.2d, 552)

> "In all of this troublesome and troubled area there is a fundamental principle. Neither law, nor policy, nor the tenets of our society would allow a child to be separated by officials of the State from its parent unless the circumstances are compelling."[3]

No "compelling" circumstances were shown here to justify the separation of children from parent. Nor did the courts below find any.

It was the stepfather's burden to prove that appellant's right not to be replaced as parent had been forfeited. But there was no proof. There was none that appellant was unfit or that he had lost his parental rights. The stepfather did not establish that the State had the power to take Mr. Caban's children away from him and hand them over to him. Upon the basis of this record, State power to grant the adoptions and destroy a parental relationship by terminating appellant's rights to be linked to his children and their rights to their own father, in order that they be placed under the parentage of a stranger, was lacking.

[3]This is quintessential "*Stanley*". The Court of Appeals ironically accepts it as the law of the land when applied to mothers (*Bennett v. Jeffreys*), but not where the separation of a child from an unwed father is involved, as it was in *Stanley* and at bar.

As long ago as 1912, a New York court had held the rights of parents to their children, "even in primitive civilizations, as one of the highest of natural rights." *Matter of Livingston*, 151 App.Div. 1, 7. *Stanley v. Illinois* held them to be among the highest ranked of all constitutional rights. (405 US, 651)

The courts below ignored these fundamental principles. By deciding the case on the sole basis of the fitness of the stepfather, they deprived appellant of the children he had sired, reared, raised, loved, protected and tenaciously kept his ties to.

These constitutionally protected rights of parents belong to fathers as well as to mothers. Marriage between the parents is irrelevant to them. They are forfeit only upon proof of parental unfitness, surrender, abandonment, persisting neglect or other similar extraordinary circumstances. They are otherwise beyond the reach of any court. *Stanley v. Illinois*, 405 US 645 (1972); *Rothstein v. Lutheran Social Services*, 405 US 1051 (1972); *Vanderlaan v. Vanderlaan*, 405 US 1051; cf. *Weinberger v. Wiesenfeld*, 420 US 636, 652 (1975), 95 S.Ct. 1225, 43 L.Ed.2d 514.

In *Stanley*, the rights of an unwed father to maintenance of his parental relationship to his children was litigated. The Court first examined the substantive rights involved: (405 US, 651)

> "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for

respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.' *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949) (Frankfurther J., concurring).

The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one's children have been deemed 'essential,' *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), 'basic' civil rights of man,' *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), and '[r]ights far more precious . . . than property rights,' *May v. Anderson*, 345 U.S. 528, 533 (1953). 'It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.' *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944). The integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, *Meyer v. Nebraska, supra*, at 399, the Equal Protection Clause of the Fourteenth Amendment, *Skinner v. Oklahoma, supra*, at 541, and the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring).

Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony. . . .

(652) These authorities make it clear that, at the least, Stanley's interest in retaining custody of his children is recognizable and substantial."

The issue at stake for the father in *Stanley*, as here, "is the dismemberment of his family." (405 U.S. 658). The holding was that natural fathers, like all parents, whether married or not, "are constitutionally entitled to a hearing on their fitness before their children are removed from their custody." (ibid, 658)

This is not to say, as did the court below, that a hearing on the fitness of strangers proposing to adopt their children is all that parents are entitled to.

> "The State's interest in caring for Stanley's children is *de minimus* if Stanley is shown to be a fit father." (405 U.S., 657)

That alone was the issue in this case. On the record, there being no proof of his unfitness, or other extraordinary factors, State power to dismember his family did not exist and the petitions should have been dismissed. To regard the hearing on the fitness of the petitioning stepfather as sufficient is to give appellant the right to a swan song. Due Process has more substance than that.

In *Rothstein v. Lutheran Social Services*, 405 US 1051, the Court first held that the principles laid down in *Stanley* apply equally to adoption cases. It vacated the holding of the Supreme Court of Wisconsin in *State v. Lutheran Social Services*, 47 Wisc.2d. 420, 178 N.W.2d. 56, 63 "that the putative father of a child born out of wedlock does not have any parental rights." As stated in the overturned Wisconsin case (178 N.W.2d., 61)

> "The question presented is whether the state of Wisconsin can protect the right of married parents and unwed mothers to the custody and control of their children by requiring their consent as a prerequisite to the termination of their parental rights without affording similar protection to the rights of a putative father."

Setting the Wisconsin court's holding aside, the United States Supreme Court answered that question with a resounding "no". It referred simply to *Stanley v. Illinois* as its authority.

It is now clear from *Quilloin* that the principles of *Stanley v. Illinois* continue to apply to adoption cases despite the earlier dismissal in *Orsini v. Blasi* of the appeal based on a paper-thin record from the *Malpica-Orsini* holding. As this Court pointedly noted in *Quilloin* (54 L.Ed.2d., 520):

> "We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.' *Smith v. Organization of Foster Families for Equality and Reform*, 431 US 816, 97 S.Ct. 2094, 53 L.Ed.2d. 14 (1977) (Stewart, J., concurring)"

Within *Quilloin*, appellant had a constitutionally protected relationship with his children, deserving of protection against the state statute and judicial acts, which it authorized, depriving him of his parentage in the absence of proof and specific finding of unfitness, under the Due Process Clause. N.Y.Dom.Rel.L., §111 (2,3) cannot withstand constitutional scrutiny by providing that Caban's children can be taken away from him without his consent.

POINT III.

APPELLANT HAS BEEN DENIED EQUAL PROTECTION OF THE LAWS.

A.

Arbitrary Nature of the Classifications – Generally.

The complete and total irrationality of the statutory classification based on sex and legal relation of the parents to each other, by virtue of which appellant would lose his children under the New York statute, is made very clear when §111 is read in its entirety. It spells out the limited exceptions to the rule in subdivisions 2 and 3 that the consent of female and wedded male parents is needed for adoption of their children. If only appellant had been born female and was a mother, or if he had been properly married – there was no such requirement for Maria – he would not now be before this Court.

Justification for the statutory distribution of rights to some parents and denial to others must be found in whether the statute rationally limits itself to the promotion of the welfare of children. It does not advance a legitimate state interest in protecting its children's right to grow up in normal homes when it creates, as it does, a legislative scheme whereby mothers and married fathers who are proved in fact in the adoption proceedings themselves to be (a) cruel and neglectful toward their children; (b) persons who chronically and habitually use alcoholic beverages to the extent that they have lost the power of self control with respect to their use and who, by reason of

alcoholism, endanger their own and their children's health, safety and welfare; (c) so advanced in age, so ill, so infirm, so weak mentally, suffering from intemperance, drug addiction and otherwise from substantial impairment of ability to care for their own property, to provide for themselves and their children to the degree that, in a proper proceeding, their property could appropriately be placed in a conservatorship; (d) persons who because of mental deficiency are unfit to care for their children and incapable of managing their own affairs; (e) parents who have surrendered their children to private parties; and (f) persons who for whatever other reasons are unfit parents, may still veto adoption of their children.

Section 111 (2,3) requires the consent even of mothers and married fathers possessed of such questionable qualities as a matter of proven fact. While §111 carves out certain carefully defined exceptions to the rule requiring consent, mothers and married fathers so endowed do not fall within the exceptions. They keep their veto – and their children. But a veto is denied to appellant, a fit and devoted father without any of the same drawbacks. He loses his children and they lose him. That is the meaning of §111.

(a) If appellant were a she or a married father, he would have been able to veto the adoption even if it had been proved in the Surrogate's Court at the adoption hearing by a courtroom full of witnesses that he was in fact cruel and neglectful to his children – so long as, perchance, a court other than the Surrogate's Court, which itself lacked jurisdiction, on an earlier occasion had not deprived him of custody of the children for those reasons, or pursuant to a judicial

finding that a child is a "permanently neglected child as defined in section six hundred eleven of the Family Court Act of the State of New York." (cf. *Matter of Sanjivini K.*, 40 N.Y.2d. 1025) (§111)

(b) If he were a she or a married father, he could veto an adoption even if it were proved conclusively that he was in fact an "alcoholic"[4] – so long as, perchance, he had not been "adjudged to be a habitual drunkard" in a different proceeding in a court other than the Surrogate's Court which lacked jurisdiction. (N.Y. Mental Hygiene Law, §78.01)[5] (§111)

(c) If he were a she or a married father, he could veto an adoption even if it were proved that he was in fact, "by reason of advanced age, illness, infirmity, mental weakness, intemperance, addiction to drugs, or other cause [suffering from] substantial impairment of his ability to care for his property or has become unable to provide for himself or others dependent upon him for support," and even if found warranted in a proceeding brought for that purpose in a different court that his property be placed under conservatorship under N.Y. Mental Hygiene Law, §77.01 – just so long as, perchance, he "has not been judicially declared incom-

[4] See New York Mental Hygiene Law, §1.05(14): " 'alcoholic' means any person who chronically and habitually uses alcoholic beverages to the extent that said person has lost power of self control with respect to the use of such beverages or who, by reason of alcoholism, endangers the health, safety, or welfare of himself or others."

[5] §78.01: "The supreme court, and the county courts outside the city of New York, have jurisdiction over the custody of a person and his property if he is incompetent to manage himself or his affairs by reason of * * * drunkenness, * * *"

petent" by another court.[6] Such an impaired person is a "conservatee" under §77.01. If a mother or married father is adjudged to be that type of crippled human being, her or his need to consent to adoption is not waived by the specific exceptions contained in §111, but it would still be required.

(d) If he were a she or a married father, he would be able to veto an adoption even if it were proved by a host of reliable witnesses that he was unfit, in fact, properly to care for his children because of mental deficiency or a mental impairment technically not within the statutory definition of "mental retardation."[7] That is because "mental deficiency" is defined differently from "mental retardation" and it is only if he were "mentally retarded as defined by the Mental Hygiene Law" that he would lose his right to withhold his consent to the adoption of his child. Mere unfitness

[6] N.Y. Mental Hygiene Law, §77.01:

"The supreme court, and the county courts outside the city of New York, if satisfied by clear and convincing proof of the need therefor, shall have the power to appoint one or more conservators of the property (a) for a resident who has not been judicially declared incompetent and who by reason of advanced age, illness, infirmity, mental weakness, intemperance, addiction to drugs, or other cause, has suffered substantial impairment of his ability to care for his property or has become unable to provide for himself or others dependent upon him for support, * * * Such person for whom a conservator is appointed is hereinafter designated as the 'conservatee.' "

[7] Mental Hygiene Law, §1.05(18): "Subaverage intellectual functioning which originates during the developmental period and is associated with impairment in adaptive behavior."

due to "mental deficiency" would not take that right from him.[8] (§111)

(e) If he were a she or a married father, he would be able to veto adoption of his children even if it were shown that he has surrendered these children to a private person – to the extent of losing his constitutional right to prevent termination of his parental rights (cf. *Matter of Bennett v. Jeffreys*, 40 N.Y.2d. 543, 550) – because the statute makes his consent nonetheless necessary so long as surrender is not to "an authorized agency under the provisions of the Social Service Law." (§111)

(f) If he were a she or a married father, he could veto adoption of his children even if it were established beyond a reasonable doubt at the adoption hearing that he was unfit as a parent for any number of other reasons than enumerated in the statute – for parental unfitness, as such, is not a ground for allowing adoption without the unfit female or married male parent's consent. (§111)

Appellant, however, does not suffer from any of the above problems. His is worse than all of them put together. He is the father, not the mother; and he was not married to the mother. That is enough in New York to cast him outside the fold of those parents, including those referred to in (a) through (f) above, who are privileged by §111 to keep from being replaced.

[8] N.Y. Mental Hygiene Law, §67.07: " 'Mental deficiency' shall mean mental deficiency as defined by appropriate clinical authorities to such extent that a person so afflicted is incapable of managing himself and his affairs, but shall not include mental illness as defined herein."

The need of children to be raised by loving parents is not advanced by this discriminatory classification. Their interests appear not even to have been considered. New York children, no less than unwed fathers concerned with their own offspring, are senselessly penalized with the loss of a basic human relationship. The statute fiercely protects the rights of "many persons who have, at best, a remote and indirect interest" in their children, "and, on the other hand, excludes others" (such as appellant) "who have a distinct and direct interest in" them. (cf. *Kramer v. Union Free School District*, 395 US 621, 632 (1968)[8a,9] An important consequence is that some children will be denied a needed chance to have wholly unfit natural parents exchanged for loving adoptive ones because their unfit

[8a]"Before I built a wall I'd ask to know
What I was walling in or walling out,
And to whom I was like to give offense.
Something there is
that doesn't love a wall,
That wants it down."
From Mending Wall
by Robert Frost

[9](See Malone, Comment, 44 Fordham L.Rev. 646, 656-7 (1975) "The infirmity of section 111(3) is that in pursuit of the admirable goal of the child's best interests, the legislature has unnecessarily demeaned the basic rights of the unwed father to the maintenance of his relationship with a child he has sired and raised. Ironically, under the ironclad presumptions of the present statute, the consent of the unfeeling and irresponsible unwed mother or divorced father is a prerequisite to adoption while the constructive and loving contact between an unwed father and his child is terminable by adoption without the father's consent. In this way the statute can frustrate the very purposes for which it was designed.

So long as the legislature chooses to retain the present statutory scheme, the continued denial of full parental status to the unwed father who has assumed parental responsibility for his child is unjustified.")

mothers or married fathers may refuse for whatever reason to consent to their adoption; while still other children, with devoted natural fathers, will be forced to exchange these natural parents for adoptive fathers and come of age with the deep-seated ache to know their roots with natural fathers of fond but distant memory whom they lost only because their parents were not married, despite their father's best efforts to keep them.[10]

Where fundamental rights are discriminatorily withheld, as here, the human right to keep one's own children, and – as in *Kramer*, the political right of franchise – "* * * the issue is not whether the legislative judgments are rational. A more exacting standard obtains." If the classification between those who may, and those who may not, exercise, such rights is not closely tailored to furtherance of a "compelling State interest", it must fall under the Equal Protection Clause. [ibid., 633]

B.

Sex as the Standard – Viewed Separately

Both on its face and as construed and applied here, §111 allows one parent of a child born out of wedlock the right to veto the other parent's adoption petition,

[10]The often empty longing of adopted children to know their roots and their natural parents, the reciprocal longing of the natural parents themselves for children whom they had voluntarily, unlike appellant, given up for adoption, and their frequent search for each other, carefully considered in Sorosky, Baran, Pannor, *The Adoption Triangle*, Anchor/Doubleday, Garden City, 1978.

so long as the parent vetoing was the natural mother who had sent her young children thousands of miles away to live with a grandparent and the parent being vetoed the father, who had brought his children back home. Whether there was a right to veto adoption is made to depend on the sex of the parent. Short shrift was accordingly given to appellant's cross-petitions for adoption below. (A. 11, 16) Appellant being male, the trial court merely noted that a "putative father opposing such an adoption [by the stepfather], without the consent of the natural mother, has himself no prospect of adopting the child." (A. 27)

The male parent, however, has no corresponding right to veto. Thus, because of his sex, the statute denies a right to this fit and concerned father, to veto an adoption of his children by a stranger, which would forever take his children from him.

The contrast between the unwed father's equality with the unwed mother in child custody cases and his abject helplessness against an outside male's petition to adopt his children and permanently deprive him of them and them of his is spectacular.

A New York statute provides:

(N.Y.Dom.Rel.L, §70)

> "In all cases there shall be no prima facie right to the custody of the child in either parent, but the court shall determine solely what is for the best interest of the child, and what will best promote its welfare and happiness, and make award accordingly."

Accordingly, in custody disputes between the parents of children born out of wedlock, unwed father's rights have been strictly protected and treated as equal to the

mother's in New York in safeguarding the child's best interests. *Matter of Hilchuk v. Grossman*, 57 A.D.2d. 798, 394 N.Y.S.2d. 400 (1977). Where the facts indicate, an award will be made to the unwed father as against the unwed mother under §70. *Matter of Boatright v. Otero*, 91 Misc.2d. 653, 398 N.Y.S.2d. 391 (1977). As against a non-parent, such as a stepfather or the maternal grandmother in Puerto Rico, the unwed natural father clearly has a superior right to custody. *Raysor v. Gabbey*, 57 A.D.2d. 437, 395 N.Y.S.2d. 290 (1977) (note *Vanderlaan v. Vanderlaan*, 405 US 1051, 92 S.Ct. 1488, 31 L.Ed.2d. 287, reported on remand at 9 Ill. App.3d. 260, 262, 292 N.E.2d. 145, 6 (1972) where it is held that a father cannot be barred from asserting custody of his children born out of wedlock under *Stanley v. Illinois*).

Since their rights at the outset were equal, and appellant was a devoted parent, there was a distinct possibility that he might have been awarded legal custody in the children's best interest if the custody proceedings, which began before and pended throughout the adoption proceedings, had instead gone to conclusion on the merits. There is nothing in the record to have foreclosed that possibility. But only in that case would §111(4) have given appellant the right to prevent loss of his children to a stranger.

His constitutional right is made to depend not on his solid family ties but on "legal" custody. This is because of his sex. But on the other hand, the female parent is allowed to veto adoption by the father of his own children even if her legal custody is merely temporary – even if it had been ultimately terminated and custody awarded to the father by the Family Court in

the children's best interest – even if she did not possess any legal or actual custody at all. This is because of her sex.

The statutory distinction based on the sex of the parents is thus totally irrational. It violates both Due Process and Equal Protection. It has deprived appellant of his children and this Court should so declare its unconstitutionality.

> "[*Reed v. Reed*, 404 U.S. 71 (1971)] emphasized that statutory classifications that distinguish between males and females are 'subject to scrutiny under the Equal Protection Clause.' 404 U.S., at 75. To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197, 97 S.Ct. 451 (1976)

The challenged statute here does not and is not.[10a]

[10a] Referring to the invalidity of its own adoption statute under the Pennsylvania Constitution's Equal Protection Clause, the high court of that state held: "It is clear that, as a consequence of section 411, unwed fathers have no rights under the Adoption Act, while unwed mothers have all the rights of married parents. The only differences between unwed fathers and unwed mothers are those based on sex. This is an impermissible basis for denying unwed fathers rights under the Act." *Adoption of Walker*, 468 Pa. 165, 170-1, 360 A.2d 603, 605-6 (1976) The court pointedly noted: "Federal constitutional law compels the same result we reach on the basis of the Pennsylvania Constitution. [Stanley v. Illinois, 405 U.S. 645]" (468 Pa., 171n, 360 A.2d, 606n.)

C.

Marriage to the Mother as the Standard – Viewed Separately.

A further discriminatory statutory classification is based on the fact that the children were born into an out of wedlock *de facto* family, resulting here in further violations of Equal Protection. The argument that the unwed father is entitled to the same rights as a married one had been made and rejected in *Quilloin* (54 L.Ed.2d, 520) only because the father there did not show the existence of a close and responsible relationship to his child deserving on balance of protection. The facts are otherwise here, as has been shown. The time has come for this Court to pronounce as applicable to adoption statutes, as here and similarly applied, the holding in *Stanley v. Illinois*, (405 US, 651-2):

> "Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony. The Court has declared unconstitutional a state statute denying natural, but illegitimate, children a wrongful-death action for the death of their mother, emphasizing that such children cannot be denied the right of other children because familial bonds in such cases were often as warm, enduring, and important as those arising within a more formally organized family unit. *Levy v. Louisiana*, 391 US 68, 71-72 (1968). 'To say that the test of equal protection should be the 'legal' rather than the biological relationship is to avoid the issue. For the Equal Protection Clause necessarily limits the authority of a State to draw such 'legal' lines as it chooses.' *Glona v. American Guarantee Co.*, 391 US 73, 75-76 (1968)." cf.

People ex rel Slawek v. Covenant Children's Home, 52 Ill.2d. 20, 284 N.E.2d. 291 (1972)"

A mere legal marriage does not a true father make. To have denied appellant the rights of a married father to preserve his parental ties under the facts here on the basis of the §111 classification is to violate his rights to Equal Protection. The statute is unconstitutional as applied for that reason as well, and the Court should so hold.

D.

Unsupported Presumption in Place of Proof Includes Appellant in Over-Broadly Defined Class Without Rights.

Whether the classification based on sex or that based on marital status of parents is considered alone or together with each other, it is founded on a conclusive, irrebuttable presumption which the statute makes appellant powerless to defeat: that he is somehow, because of his sex and non-marital status, less than fit as a parent. While §70 properly provides for the absence of any presumptions "in all cases" between parents involving custody, §111 in effect creates a conclusive presumption of unfitness of even the best of unwed fathers. It violates the *Stanley* precept against "presuming rather than proving * * * unfitness solely because it is more convenient to presume than prove." (405 US, 658) (See *Vlandis v. Kline*, 412 US 441 93 S.Ct. 2230, 37 L.Ed.2d. 63 (1973) on the violation of Due Process by a permanent unrebuttable presumption that may not be true).

Proceeding by unrebuttable presumption in this case is totally unjustified. As expressed in *Stanley* (405 US, 654-5):

> "It may be, as the State insists that most unmarried fathers are unsuitable and neglectful parents. . . . But all unmarried fathers are not in this category; some are wholly suited to have custody of their children. This much the State readily concedes, and nothing in this record indicates that Stanley is or has been a neglectful father who has not cared for his children."[11, 12]

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[11] Herzog, *Some Notes about Unmarried Fathers*, Child Welfare, 25:194 (1966) (Elizabeth Herzog, Chief, Child Life Studies Branch, Division of Research, Children's Bureau, Welfare Administration, U.S. Department of Health, Education, and Welfare, Washington, D.C.)

"Misconceptions About Unmarried Fathers

Despite the dearth of research, we have enough evidence to show that a number of cliches, or stereotypes, or misconceptions about unmarried fathers do not stand up under inspection. For brevity, I am merely going to state four of them, without attempting to document my statements and without their full quota of qualifications.

1. According to our reading of the evidence, it is not true that the unmarried father's relations with the unmarried mother are usually fleeting and casual. On the contrary, for the great majority, the children born out of wedlock represent the involvements ranging from months to years in duration, and from affection to love – or to what felt to be love at the time but was later defined as temporary infatuation.

2. It is not true that the unmarried father is typically an exploiter of someone much younger, poorer, or less educated than himself. On the contrary, he tends to resemble the unmarried mother in age, in socioeconomic status, and in education.

3. It is not true that if marriage is considered, the unmarried father is invariably the reluctant member. On the contrary, sometimes he wants marriage and she does not.

(continued)

The Court approvingly cited *In re Mark T.*, 8 Mich. App. 122, 154 N.W.2d. 27 (1967) in its footnote for the following observation: (405 US, 654-5n.)

> " 'We are not aware of any sociological data justifying the assumption that an illegitimate child reared by his natural father is less likely to receive a proper unbringing than one reared by his natural father who was at one time married to his mother, or that the stigma of illegitimacy is so pervasive it requires adoption by strangers and permanent termination of a subsisting relationship with the child's father."

The statute's discriminatory classification based exclusively on sex and marriage cuts a wide swath into one of the most precious human relationships, that of parent and child. The right of a parent to raise his own child is fundamental. *Stanley v. Illinois*, 405 US, 651. A statute which creates discriminatory classifications of persons who may and may not exercise a fundamental human right requires critical examination by this Court.

(footnote continued from preceding page)

4. According to our reading of presumptive evidence, which is the only kind we have on this point, it is not true that to become an unmarried father is an unfailing symptom of psychopathology, calling for therapy. On the contrary, there is enough evidence about unmarried mothers to rule out the blanket assumption that pregnancy out of wedlock inevitably or even usually indicates pathology on the part of the unmarried mother, and there seems no reason to assume more pathology on the part of the unmarried father."

Also, Pannor, Massarik, Evans, *The Unmarried Father*, (Springer, N.Y. 1971) p. 85.

[12]Sorosky, et al. (supra, n. *10*), p. 49: "Recent studies have looked at the role of the unwed father in depth. These demonstrated that he is not an irresponsible 'swinger' and is more concerned about the pregnancy and his offspring than has been recognized."

Zablocki v. Redhail, ____ US ____, 98 S.Ct. 673, 679, 54 L.Ed.2d. 618 (1978).

Zablocki dealt with an Equal Protection violation of the right to marry. The Court placed it and the right to raise one's children and maintain family relationships "on the same level" (98 S.Ct., 681, 54 L.Ed.2d, 630). In language which could appropriately serve for the case at bar, the Court stated (98 S.Ct., 682, 54 L.Ed.2d, 631):

> "When a statutory classification significantly interferes with the exercise of a fundamental right, it cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests."

The burden to uphold the classification rests, under *Zablocki* principles, upon appellees who are benefitting from it. There is no "sufficiently important state interest" in this case to justify tearing this father from his children.

The breadth of the statute lumps together and denies rights to fit and unfit fathers of children born out of wedlock alike (but preserves rights to unfit married fathers); it joins unwed fathers with deep and basic parental relationships and family ties with their children in a common denial of rights with unwed fathers who have lacked any interest at all following the act of procreation – but preserves the rights of totally disinterested married fathers.

It prevents a fit father with the right to assert his own custody rights of his children as against a claim of the natural mother from asserting parental rights and vetoing their adoption by a total blood stranger, all because of his sex and lack of a legal relationship to the

mother – while it grants the same mother, who lacked a legal relationship with him and who is litigating the rights of custody with him in another court (and who might lose them to him), the right to veto his adoption of his own child.

At the same time, without any state interest in promoting adoption by mothers of out of wedlock children, but not fathers, it permits the mother to certify the jural relationship of the children to herself by adopting them without the father's consent – though without her consent he is barred from doing the same thing.

The reference in *Zablocki* (concurring opinion, Stevens, J., 98 S.Ct., 691) to an equally wide-ranging statute as

> "a statutory blunderbuss * * * * This clumsy and deliberate legislative discrimination * * * is irrational in so many ways that it cannot withstand scrutiny under the Equal Protection Clause of the Fourteenth Amendment."

also well describes §111 (2,3).

Just as this Court held in *Stanley* that denying a hearing on fitness "to Stanley and those like him while granting it to other Illinois parents is inescapably contrary to the Equal Protection Clause," (405 US, 658), so too the gender-based wedlock-based classifications in §111 are arbitrary, invidious, irrationally discriminatory and violative of appellant's rights to Due Process and to the Equal Protection of the Laws, both on its face and as applied.

(h) Conclusion.

For the foregoing reasons, the judgment of the New York Court of Appeals was violative of appellant's rights under the Fourteenth Amendment of the Constitution of the United States and should be reversed.

Respectfully submitted,

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